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INTERNATIONAL ESTATE PLANNING 101: A BASIC GUIDE TO ESTATE PLANNING FOR NON-CITIZEN CLIENTS

by

Robin Rose Stiller

The United States has often been called the "great melting pot of the world" because of the large numbers of foreign-born individuals that can be found here. In fact, according to the 1990 U.S. Census, 19.8 million people living in the United States were foreign-born,¹ including nearly 260,000, or 2.4%, of Ohioans.² Nearly 12 million of those foreign-born and living in the U.S. were not U.S. citizens³ and in 1996, Ohio alone was home to 113,000 legal permanent resident aliens.⁴ In addition to these resident aliens, large numbers of nonresident aliens, such as the more than 19 million alien tourists, 610,000 temporary workers and 426,000 students, spent time in the United States in 1996.⁵ Why are all these numbers important to us? Because in addition to these nonresident alien individuals in our population, over 10 million of the noncitizens living in the U.S. were 18 years old or older⁶ and could thus plan for their future by executing estate plans.⁷ These

¹ Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990* (visited October 10, 1999) <<http://www.census.gov/population/www/documentation/twps0029/tab11.html>>.

² Campbell J. Gibson & Emily Lennon, *Historical Census Statistics on the Foreign-born Population of the United States: 1850-1990* (visited October 10, 1999) <<http://www.census.gov/population/www/documentation/twps0029/tab13.html>>.

³ See Gibson & Lennon, *supra* note 1.

⁴ Immigration and Naturalization Service, *Population Estimates by State of Residence: Legal Permanent Residents and Aliens Eligible to Apply for Naturalization as of April 1996* (visited Oct. 15, 1999) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/lprest.htm>>.

⁵ Immigration and Naturalization Service, *Statistics: Country of Origin* (visited Oct. 15, 1999) <<http://www.ins.usdoj.gov/graphics/aboutins/statistics/299.htm>>. The University of Akron shows 919 foreign students admitted for the Fall 1999 Semester. Telephone interview with the Office of International Programs, The University of Akron, in Akron, Ohio (Nov. 10, 1999).

⁶ See Gibson & Lennon, *supra* note 1.

⁷ See, e.g., OHIO REV. CODE ANN. § 2107.02 (West 1999). All states, with the exception of Louisiana, and the District of Columbia require that a testator be at least 18 years of age in order to execute a valid will. Louisiana, which uses a civil law regime of succession and forced heirship, allows those 16 years of age or older to execute a will. See LA. CIV. CODE ANN. art. 1476 (West 1999). For a description of forced heirship and universal succession, see *infra* notes 38-39 and accompanying text.

numbers are also important because the entire worldwide estate of U.S. citizens and resident aliens is subject to estate tax, but only the portion of a nonresident alien's estate that is situated in the U.S. will be subject to the U.S. estate tax.⁸ It thus becomes crucial to determine the alien client's status and draft an estate plan most beneficial to the client and his heirs. Estate planning considerations for aliens may vary from those of U.S. citizens and the purpose of this article is to highlight the areas of difference and similarity and to address the basic estate planning needs of these noncitizens.

I. BACKGROUND INFORMATION AND CONSIDERATIONS

A. Common Law Rules

An "alien" is defined under the United States Code as any person not a citizen or a national of the United States.⁹ Under the common law, although aliens could inherit personal property,¹⁰ there could be no inheritance of real property by, from or through an alien because an alien had no inheritable blood.¹¹ Thus, even U.S. citizens could not take property by representation from an alien.¹² If an alien died intestate, his real property vested in the state immediately.¹³

B. Statutory Rights

In the United States, aliens only have such rights to property as are permitted by federal and state law.¹⁴ Both federal treaties and state statutes thus determine the rights of these aliens.¹⁵ Under many state statutes aliens can dispose

⁸ See I.R.C. §§ 2101, 2031(a) (1999); Mark Sherman, *Estate and Gift Taxation of Non-Resident Aliens*, 3-FALL INT'L LEGAL PERSP. 127, 130-31 (1990).

⁹ See 8 U.S.C.A. § 1101 (a)(3) (1999).

¹⁰ See e.g., *McLearn v. Wallace*, 35 U.S. 625, 637 (1836).

¹¹ See e.g., *Webb v. O'Brien*, 263 U.S. 313, 321 (1923).

¹² See e.g., *Johnson v. Olson*, 142 P. 256, 258 (1914).

¹³ See e.g., *Fairfax's Devisee v. Hunter's Lessee*, 11 U.S. 603 (1812).

¹⁴ See, e.g., *Beavan v. Went*, 41 N.E. 91, 93 (Ill. 1895) (holding that without a statute to the contrary, an alien is barred from taking any interest in real estate by inheritance through another alien); *Donaldson v. State ex rel. Honan*, 101 N.E. 485, 489 (Ind. 1913) (explaining that the capacity of an alien to transmit or take real property by devise or descent is a creature of the law of the state where the property is situated).

¹⁵ See e.g., *Metzger v. Metzger*, 188 N.W. 229, 230-31 (Neb. 1922) (holding that a statute disallowing devise of real estate to nonresident aliens is not precluded if no treaty between the United States and the country of the nonresident alien's citizenship mandates such

of real property in the same manner as citizens.¹⁶ For example, § 2105.16 of the Ohio Revised Code states that aliens may hold and possess lands by purchase, gift, devise or descent as fully as any citizen of the United States or of Ohio, and that heirs of aliens may inherit real property through their alien ancestors.¹⁷

Some statutes make distinctions between resident aliens and nonresident aliens and between real property and personal property and allow only resident aliens to devise real estate.¹⁸ Others provide few, if any, property rights to nonresident aliens.¹⁹

preclusion). Under the treaty-making power, the treaty supercedes state law conflicting with a federal treaty on alien inheritance rights. U.S. CONST. art. VI, cl. 2. Treaties generally entitle both resident and nonresident aliens to inherit from citizens as well as from aliens. *See, e.g.,* Dutton v. Donahue, 8 P.2d 90, 91 (Wyo. 1932).

¹⁶ *See, e.g.,* George v. People, 40 N.Y.S.2d 830, 834 (Sup. Ct. 1943), *aff'd*, 47 N.Y.S.2d 681 (2d Dept. 1944); Schoellkopf v. DeVry, 7 N.E. 2d 757, 763 (Ill. 1937) (stating that, by statute, an alien may convey land during his lifetime and thus may devise his land because a devise is in the nature of a conveyance). *See also*, 765 ILL. STAT. ANN. 60/7 (West 1999); MICH. COMP. LAWS ANN. § 554.135 (West 1999); PA. STAT. ANN. tit 68, § 22 (1994); W. VA. CODE § 36-1-21 (1999).

¹⁷ *See* OHIO REV. CODE ANN. § 2105.16 (1999). In Ohio, nonresident aliens who acquire real property in excess of three acres or with a market value greater than \$100,000 must register with the Secretary of State. *See* OHIO REV. CODE ANN. § 5301.254 (1999). Kentucky and Indiana place restrictions on the alien ownership of real property. *See*, KY. REV. STAT. ANN. § 381.290-330 (Michie 1999) (requiring nonresident aliens to become U.S. citizens or their property will escheat to the state unless it is conveyed within 8 years of acquisition by descent or devise); IND. CODE ANN. § 32-1-8-1 to -2 (West 1999) (prohibiting aliens not intending to become U.S. citizens from owning more than 320 acres and requiring them to convey property acquired by descent or devise within 5 years or it will escheat to the state).

¹⁸ *See, e.g.,* *In re Estate of Constan*, 384 A.2d 495 (N.H. 1978). The court stated that while resident aliens could devise real estate and the real estate could descend in the same manner as if the aliens were citizens, no such rights were conferred on nonresident aliens. *See Id.* at 496. *See also*, Metzger v. Metzger, 188 N.W. 229, 231 (Neb. 1922) (holding that nonresident aliens may not acquire real property by will). Other statutes allow the devise of real estate to a nonresident alien only with restrictions or conditions. *See, e.g.,* Purcell v. Smidt, 21 Iowa 540, 549 (1866) (noting that devise of real estate to a nonresident alien is allowed if the nonresident alien makes a declaration of intent to become a U.S. citizen).

¹⁹ *See e.g.,* State *ex rel.* Cartwright v. Hillcrest Investments, Ltd., 630 P.2d 1253, 1256 (Okla. 1981) (explaining the restriction on nonresident alien ownership of real property applies to alien corporations as well); Donaldson v. State *ex rel.* Honan, 101 N.E. 485, 489 (Ind. 1913) (holding that although nonresident aliens may convey real property, they may

C. *The Effect of Transfer Tax Treaties*

Any estate planning done for noncitizens must take into account whether or not there is a treaty between the U.S. and the country in question which covers tax issues.²⁰ Currently, the U.S. is a party to at least seventeen transfer tax treaties.²¹ Treaty provisions may govern a noncitizen's right to convey property by will or the right to take real estate by descent.²² They may also determine the transfer tax treatment to be afforded to particular aliens.²³ Some transfer tax treaties, for example, provide that nonresident aliens will be treated the same as U.S. citizens and resident aliens.²⁴ In the case of the unified credit, for instance, this could allow a nonresident alien a larger credit than under the current U.S. transfer tax rules.²⁵

Treaties are often relevant in the estate-planning context because their provisions may operate to supersede the U.S. gift and estate tax rules.²⁶ Treaties are

not take title to land by descent).

²⁰ See STEPHEN R. LEIMBERG ET AL, *THE TOOLS AND TECHNIQUES OF ESTATE PLANNING*, 213 (11th ed. 1998).

²¹ Cf. Allen E. Rozansky, *International Estate Planning*, 24 COLO. LAW. 1305, 1307 (1995). Several transfer tax treaties have become effective recently and are included in Appendix A which lists all the current transfer tax treaties to which the United States is a party. The Canadian treaty, although essentially an income tax treaty, affects the rules concerning U.S. transfer taxes. See Brown, *infra* note 43, for an overview of the Canadian taxing scheme and its effect on U.S. transfer taxation.

²² See e.g., *Todok v. Union State Bank*, 281 U.S. 449, 452 (1930) (stating that state statutes restricting an alien's rights to devise property were superseded by a treaty in effect with the alien's home country); *In re Estate of Constan*, 384 A.2d 495, 496 (N.H. 1978) (stating that though aliens were incapable of taking real estate by descent at common law, such rights could be conferred by statutes or treaties).

²³ See William H. Newton, III, *Estate, Gift, and Generation-Skipping Transfer Tax Treaties*, 37 SW. L.J. 563, 567 (1983).

²⁴ See *Id.* at 564.

²⁵ See Rozansky, *supra* note 21, at 1307. The larger credit will be increased by a percentage equal to the ratio of the decedent's estate situated in the U.S. over the value of his entire gross estate. See *Id.* The non-resident alien would have to disclose his entire worldwide estate, however, in order to claim the treaty benefit. See *Id.*

²⁶ See Newton, *supra* note 23, at 567. Most U.S. transfer tax treaties do, however, include a savings clause that preserves the right of the United States to tax its citizens and domiciliaries as if the treaty had not been entered into. See *Id.* at 570. This clause may become important when dealing with expatriated American citizens.

also relevant because their overall effect is the prevention or reduction of the impact of double taxation,²⁷ usually in the form of a credit.²⁸

There are basically two different types of U.S. transfer tax treaties.²⁹ The first treaty type outlines rules for determining where specific property is located and states that the country where the property is situated has exclusive treaty tax jurisdiction over the transfer of the property, regardless of where the transferor is domiciled.³⁰ The second treaty type delineates where the transferor's domicile will be for gift and estate tax purposes and states that the country where the transferor is domiciled has the primary jurisdiction over taxable transfers by the transferor.³¹ Regardless of the particular treaty type, all estate planning for aliens, whether resident or nonresident, must keep treaty provisions in mind that are applicable to the particular alien client.³²

D. Cultural Differences

American attorneys planning for estates of foreign clients should realize that often U.S. estate planning concepts are at odds with those of other countries.³³ Increasingly, clients may want an estate plan that disposes of assets that are located in various countries. Naturally, various questions can arise, such as can a U.S. will dispose of property in France or can a QDOT in a will work in Italy?³⁴ The American common law traditions are quite different than the civil law systems of most of Western Europe which, for example, employ the community property

²⁷ See *Id.* at 564.

²⁸ See Richard M. Fijolek & J. Mitchell Miller, *Marital Deduction Planning for Noncitizen Spouses*, 20 EST. PLAN. 20, 26 (1993). The treaty tax credit determines which country has the primary right of taxation and which must grant the credit. Newton, *supra* note 23, at 590.

²⁹ Rozansky, *supra* note 21, at 1307.

³⁰ *Id.* The current U.S. treaties in this category are those with Australia, Finland, Greece, Ireland, Italy, Japan, Norway, South Africa and Switzerland. Leslie A. Share, *Domicile is Key in Determining Transfer Tax of Noncitizens*, 22 EST. PLAN. 31, 36 (1995).

³¹ Rozansky, *supra* note 21 at 1307. This category includes current U.S. treaties with Austria, Denmark, France, Germany, the Netherlands, Sweden and the United Kingdom. Scott G. Miller, *Estate Tax Planning for Nonresident Alien Business Owners*, 24 EST. PLAN. 377, 382 (1997).

³² Newton, *supra* note 23, at 564.

³³ Barbara R. Hauser, *The Tale of the Testament*, 12 PROB. AND PROP. 58, 59 (1998).

³⁴ *Id.*

system.³⁵ In the community property system, a married decedent may only dispose of one half of the couple's community property.³⁶ Ohio estate planners must determine whether assets are considered community property and must then plan accordingly if the assets were acquired by the alien couple in their home country, or if the alien has resided in a U.S. community property state.³⁷

Also, in civil law countries the processes of forced heirship and of succession, which provides for the automatic passage of assets at death, are used rather than a probate system to dispose of the decedent's property.³⁸ These regimes can cause concerns because the decedent may not have the same freedom of testamentary disposition that we enjoy in the U.S.³⁹ Other countries, such as Japan, have a strong tradition of family providing for the survivors of a deceased family member. Wills are not viewed as necessary or desirable in such a system and many such citizens do not have and would not prepare a will, but would depend upon the laws comparable to our laws of intestate succession.⁴⁰ Some countries do not recognize trusts as a legal entity for use in estate planning and so this common American planning device may not work for them.⁴¹ Consequently, in order to effectively serve an alien client, the estate planner must be sensitive to both the cultural differences and the conflicting legal systems employed worldwide.

³⁵ *Id.* at 60.

³⁶ *Id.*

³⁷ Leimberg, *supra* note 20, at 215.

³⁸ Hauser, *supra* note 33, at 60.

³⁹ Under the concept of universal succession, assets and liabilities of the decedent generally pass automatically to the heirs upon the decedent's death. *Id.* The forced heirship theory provides that the bulk of an individual's property must pass to his descendants in equal shares, immediately and unconditionally, upon death. Antony G.D. Duckworth, *The Trust Offshore*, 32 VAND. J. TRANSNAT'L L. 879, 900 (1999). This occurs regardless of the decedent's wishes, but is generally limited to a certain "reserved portion" of the estate. *Id.* at 901. The policy appears to be to restrict an individual's ability to disinherit his children. *Cf. Id.* The decedent can still have the power of testamentary disposition over the "disposable portion" of his property. *Id.* In most forced heirship regimes, an individual's freedom to dispose of property inter vivos is also restricted and this could cause concern if an alien has entered into any kind of inter vivos trust arrangement which may be subject to claw-back by the heirs. *Id.*

⁴⁰ Eugene F. Scoles, *International Estate Planning*, 28 INT'L. LAW. 199, 204 (1994) (reviewing CHARLES G. STEPHENSON ET AL., *INTERNATIONAL ESTATE PLANNING* (1992)).

⁴¹ CYM H. LOWELL & TERRY B. ABEL, *INSTANTLY WEALTHY*, 23 U. OF MIAMI INSTITUTE ON ESTATE PLANNING ¶ 1608 at 16-37, 16-43 (1989).

II. EFFECTIVE ESTATE PLANNING FOR ALIENS

There are several situations and clients for whom an international or multinational estate plan may be necessary. Because the United States has transfer tax rates as high as 55%,⁴² considered some of the highest gift and estate tax rates in the world,⁴³ a major goal of estate planning for these noncitizen clients is the minimization of U.S. taxes.⁴⁴

A. Definitions

To design an effective estate plan for a noncitizen, the first step is to identify the alien's status for tax purposes. Resident aliens are individuals who immigrate to the United States and become permanent residents (those holding "green cards"), but are not U.S. citizens.⁴⁵ By contrast, nonresident aliens are individuals who are not U.S. citizens and who are not deemed to be resident aliens, and include such persons as students, temporary workers, entertainers and visitors.⁴⁶ The IRS has established different tests for determining if an alien is to be considered a U.S. resident depending on whether federal income tax or federal estate tax will be imposed.⁴⁷ Under the income tax rules, an alien is treated as a U.S. resident if he is a lawful permanent resident or if he meets the objective "substantial presence test."⁴⁸ If the alien is physically present in the U.S., then,

⁴² I.R.C. § 2001(c).

⁴³ Sharon Lorraine Brown, *The Ramifications of the Third Protocol to the 1980 United States-Canada Income Tax Treaty on United States/Canadian Citizens, Permanent Resident Aliens, and Non-Resident Aliens Who Engage in Cross-Border Estate Planning*, 21 SUFFOLK TRANSNAT'L L. REV. 307, 364 (1998).

⁴⁴ Leimberg, *supra* note 20, at 213.

⁴⁵ Lowell & Abel, *supra* note 41, at 16-37.

⁴⁶ I.R.C. § 7701(b)(1)(B).

⁴⁷ Leimberg, *supra* note 20, at 213.

⁴⁸ I.R.C. § 7701(b). This test does not apply if the alien can show a closer connection between himself and a foreign country than his connection with the United States. Lowell & Abel, *supra* note 41, at 16-38. A closer connection with a foreign country can be shown by being present in the U.S. for fewer than 183 days in the current year, having a tax home in a foreign country, and by maintaining more significant contacts with the foreign country than with the United States. Treas. Reg. § 301.7701-1(b)(2). In addition, most U.S. income tax treaties provide "tie-breaker" rules for situations where the alien would be a resident of both countries. Lowell & Abel, *supra* note 41, at 16-39. The Treasury Regulations provide that treaty tie-breakers will prevail and the alien will be treated as a non-resident alien for income tax purposes. *Id.*

subject to a complex network of rules and tests, he is usually treated as a resident.⁴⁹

The federal estate tax rules, however, define a U.S. resident as a person who is "domiciled" in the U.S. at the time of his death⁵⁰ and one is not domiciled in the United States unless he is physically present here and intends to remain here indefinitely.⁵¹ Because subjective intent is the standard used to determine domicile, a person could be a resident for income tax purposes but not for transfer tax purposes.⁵² If the alien is deemed to be a resident under either the income or estate tax definition, he will be subject to tax in essentially the same manner as a U.S. citizen and the tax planning options for U.S. citizens will generally apply.⁵³

B. Resident Alien Client

Generally, estate planning options for resident alien clients are the same as those for U.S. citizen clients.⁵⁴ If the alien is deemed to be a resident for estate tax purposes, then his transfers are subject to gift and estate taxes in the same manner as the transfers of U.S. citizens residing in the U.S.⁵⁵

⁴⁹ Leimberg, *supra* note 20, at 213. U.S. residence is generally based upon either permanent resident status granted by the U.S. Immigration and Naturalization Service or physical presence in the U.S. for 31 days during one year and at least 183 days within a three-year period. *Id.*

⁵⁰ Treas. Reg. § 20.0-1(b).

⁵¹ I.R.C. § 7701. If a nonresident alien is in the U.S. for an indefinite length of time, he will not be considered to be domiciled in the U.S. if he demonstrates a present intention to return to his home country. Share, *supra* note 30, at 32. Share's article contains comprehensive coverage of the factors generally considered in determining an alien's domicile. The subjective intent to remain indefinitely can be shown by statements included in visa applications or on tax returns, the length of residency in the U.S., the standard of living the alien has in the U.S. compared with his standard of living in some other country, his country of citizenship, any ties he has with a former domicile and his reasons for an extended stay in a country other than the country he claims is his domicile. Paul J. Collins, *Many Estate Planning Benefits Exist for Nonresident Aliens with U.S. Investments*, 17 EST. PLAN. 32, 33 (1990). Other factors that are used to determine domicile include green card status, the place where the alien's family lives, ownership and registration of motor vehicles and membership in religious or civic groups. Miller, *supra* note 31, at 377.

⁵² Lowell & Abel, *supra* note 41, at 16-40.

⁵³ Leimberg, *supra* note 20, at 215.

⁵⁴ *Id.* at 213.

⁵⁵ Lowell & Abel, *supra* note 41, at 16-40.

The U.S. gift tax law applies to all transfers by such an individual⁵⁶ and estate tax applies to the entire gross estate, wherever the assets are located.⁵⁷ Thus, estate planning for resident aliens is generally the same as for U.S. citizens and the same techniques may be used to minimize transfer taxation. If the resident alien has a spouse who is a U.S. citizen, then he can avail himself of the full array of marital deductions with respect to transfers to the spouse.

The primary concern when planning for resident aliens is that Congress has eliminated the marital deduction for assets passing to a non-U.S. citizen spouse, regardless of the citizenship status of the decedent.⁵⁸ Conversely, property passing to a citizen spouse or to a qualified domestic trust qualifies for the marital deduction regardless of the citizenship of the decedent.⁵⁹ Thus, the same marital deduction concerns arise when a permanent resident, a nonresident or a U.S. citizen has a noncitizen spouse. If the client is married to a noncitizen spouse, special planning will be needed to take advantage of the marital deduction.

C. Noncitizen Surviving Spouse

Because Congress was concerned about a non-citizen spouse leaving the U.S. taxing jurisdiction, special rules apply when a decedent leaves property to his surviving spouse who is not a citizen of the United States.⁶⁰ The most pertinent of these is that in order to qualify for the unlimited marital deduction,⁶¹ property left to such a surviving spouse must be held in a Qualified Domestic Trust (QDOT).⁶² Property passing from the decedent to the noncitizen spouse is treated as passing in a QDOT if it is transferred or irrevocably assigned to such a trust before the

⁵⁶ Leimberg, *supra* note 20, at 213; I.R.C. § 2501(a)(1).

⁵⁷ Lowell & Abel, *supra* note 41, at 16-40. When considering the entire worldwide estate of such aliens, bear in mind that treaties may provide relief from double taxation.

⁵⁸ Technical and Miscellaneous Revenue Act of 1988, Pub. L. 100-647, Nov. 10, 1988, 102 Stat. 3342 (1988) (amending I.R.C. §§ 2106, 2523 and adding § 2056(d) and § 2056A).

⁵⁹ I.R.C. § 2106(a)(3).

⁶⁰ Lowell & Abel, *supra* note 41, at 16-40. Congress enacted TAMRA as a revenue raiser because it was concerned that a surviving spouse who had received property under the marital deduction could then leave the country and U.S. estate tax would never be paid on the assets. *Id.* The policy behind allowing a marital deduction for U.S. citizens was to tax the property of the husband and wife marital unit only once, upon the death of the survivor, and allowing such a deduction for a noncitizen surviving spouse posed a real threat that these assets would escape taxation in the U.S. *Cf. Id.*

⁶¹ I.R.C. § 2056(d).

⁶² I.R.C. § 2056(d)(2)(A).

estate tax return is due.⁶³ In order to qualify as a QDOT, the trust must meet four conditions:

- (1) The trust instrument must require that at least one trustee be a U.S. citizen or domestic corporation and the instrument must provide that no distribution may be made unless the U.S. trustee has the right to withhold the QDOT tax;
- (2) The surviving spouse must be entitled to all income from the property in the trust, payable at least annually;
- (3) The trust must meet the requirements of the Treasury Regulations to ensure collection of the estate tax,⁶⁴ meaning that the trust must also meet the marital deduction requirements of I.R.C. § 2056 and so must be either an estate trust, a QTIP trust, a general power of appointment marital trust or a charitable remainder trust;⁶⁵ and
- (4) The executor must make an election for a QDOT on the estate tax return and this election must be irrevocable.⁶⁶

The executor, the decedent, or the noncitizen spouse may create the QDOT and more than one QDOT may be created to benefit the noncitizen spouse.⁶⁷ Certain distributions to the surviving spouse, as well as the value of the assets remaining in the trust at the death of the surviving spouse, will be subject to federal estate tax.⁶⁸ The tax is also imposed if a person other than a U.S. citizen or domestic corporation becomes a trustee of the trust or if the trust ceases to meet the requirements set out by the Treasury.⁶⁹ In addition, the QDOT tax is computed by

⁶³ I.R.C. § 2056(d)(2)(B); Lowell & Abel, *supra* note 41, at 16-40. Both probate and nonprobate property may be transferred to the QDOT. Fijolek & Miller, *supra* note 28, at 22.

⁶⁴ Leimberg, *supra* note 20, at 216.

⁶⁵ Treas. Reg. § 20.2056A-1(b)(1); Adam M. Schenck, *Estate and Gift Taxation*, SD12 ALI-ABA 43, 69 (1998).

⁶⁶ I.R.C. § 2056A(d). Additional requirements must be fulfilled if the assets of a QDOT, or the aggregate of the assets in multiple QDOTs are in excess of \$2 million. Treas. Reg. § 20.2056A-2(d)(1).

⁶⁷ I.R.C. § 2056A(b)(2)(C). If the decedent makes a bequest to the spouse in trust and the trust does not meet the QDOT requirements, the only way to qualify for the marital deduction will be to reform the trust or irrevocably designate a QDOT to be the beneficiary of the trust. Fijolek & Miller, *supra* note 28, at 22.

⁶⁸ Leimberg, *supra* note 20, at 214; I.R.C. § 2056A(b)(11). Although distributions of principal are taxable, distributions of income and those made to the spouse on account of hardship are exempted from the QDOT tax. Fijolek & Miller, *supra* note 28, at 24.

⁶⁹ Lowell & Abel, *supra* note 41, at 16-41; I.R.C. § 2056A(b)(1) and (b)(4).

assuming that these trust assets are added to the estate of the decedent spouse.⁷⁰ If the decedent's estate tax has not been finally determined,⁷¹ a tentative tax is imposed on distributions using the highest tax rate in effect at the decedent's death.⁷² Any excess is refunded after the decedent's tax liability is finally determined.⁷³ An upward adjustment in basis is made on taxable distributions from a QDOT to account for the tax paid on any appreciation in the value of the property occurring after the decedent's death.⁷⁴ In the case of a noncitizen who is a citizen of a country with which the United States has a transfer tax treaty, the QDOT rules do not apply to the extent that they are inconsistent with the treaty provisions relating to the marital deduction.⁷⁵

Joint tenancy title situations are also different if the surviving spouse is not a citizen.⁷⁶ Under the Code, the entire value of the joint tenancy property held by a decedent with a noncitizen spouse is included in the estate of the spouse who provided consideration for the property and it is not deemed owned 50% each for estate tax purposes.⁷⁷ The presumption is that the property was completely owned by the decedent spouse.⁷⁸ Thus, other forms of ownership may be needed in order to lessen the tax burden to the surviving spouse.⁷⁹

⁷⁰ Lowell & Abel, *supra* note 41, at 16-41.

⁷¹ For example, a judicial determination of the tax is pending or the estate tax statute of limitations has not lapsed. *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Leimberg, *supra* note 20, at 214.

⁷⁵ William M. Pearson & Todd L. Bradley, *A Potpourri of Potential Pitfalls to Avoid with Qualified Domestic Trusts*, 73 FLA. B. J. 47, 50 (1999).

⁷⁶ Leimberg, *supra* note 20, at 217. If both spouses are U.S. citizens, the Code presumes that half of the joint tenancy property belongs to the decedent for estate tax purposes, regardless of the consideration furnished by that decedent. I.R.C. § 2040(b).

⁷⁷ I.R.C. §§ 2056(d), 2040(a).

⁷⁸ Sherman, *supra* note 8, at 148. The § 2040 presumption does not apply to a decedent with a noncitizen spouse and instead it is presumed that the decedent furnished all of the consideration for joint tenancy property. *Id.* at 147. This result is similar to that occurring between a decedent and a nonspouse joint tenant under the Code and the noncitizen surviving spouse must prove the amount of his or her contribution in order to avoid the inclusion of the entire value of the joint tenancy property in the estate of the decedent spouse. If the couple resides in a community property state however, the nonresident alien spouse has a vested right to one half of the community property and so one half of all such property passes to the nonresident alien spouse regardless of the estate tax rules. *Id.* at 148.

⁷⁹ For example, joint tenancies may need to be severed to give each spouse a share of the

Lifetime transfers can, however, be used to ameliorate some of the consequences to a noncitizen spouse. The citizen may utilize a lifetime gifting program to remove assets from his estate and transfer them to the noncitizen spouse. Transfers of up to \$100,000 per year to a noncitizen spouse qualify for the gift tax marital deduction, and by using the assets acquired through the gift tax deduction to purchase life insurance on the life of the citizen spouse, the noncitizen spouse can keep such insurance from inclusion in the citizen spouse's estate.⁸⁰ Because life insurance proceeds are not considered to have a U.S. situs, they would not be included in the noncitizen spouse's estate either.⁸¹ Also, in the event that the noncitizen spouse is subject to estate tax for other reasons, use of an irrevocable life insurance trust could exclude the insurance from the noncitizen spouse's estate as well.⁸² Lifetime transfers to a surviving spouse who is a U.S. resident subject to gift and estate taxes are especially useful because gifts of up to \$675,000 in 2000 can be used to take advantage of the noncitizen spouse's unified credit.⁸³ Gifts above that amount, transferred at the rate of \$100,000 per year also take advantage of the noncitizen spouse's lower estate tax brackets.⁸⁴ Thus, a plan of lifetime transfers could have advantages over the use of a QDOT, which would eventually be taxed at the conceivably higher brackets of the decedent spouse.⁸⁵ QDOTs may also be inadvisable if the noncitizen spouse does not intend to be domiciled in the United States at the time of his or her death.⁸⁶ Although estate tax will have to be paid upon the death of the decedent, the noncitizen spouse will have the rest of his or her life to convert U.S. assets to non-U.S. situs assets and may then be able to avoid U.S. estate tax upon the noncitizen spouse's death.⁸⁷

If a QDOT is to be used, care should be taken in its drafting. For example, U.S. trustees should be required to file all QDOT tax returns and to pay all QDOT

property in his or her own estate. Unwelcome income tax consequences may result from this action, however. See John Paul Parks, *Special Estate Planning Strategies to Fit the Needs of the Mobile Client*, 18 EST. PLAN. 150, 154 (1991).

⁸⁰ Leimberg, *supra* note 20, at 217. The citizen spouse must have no incidents of ownership in the insurance policy.

⁸¹ Sherman, *supra* note 8, at 137.

⁸² Leimberg, *supra* note 20, at 217.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Fijolek & Miller, *supra* note 28, at 26.

⁸⁷ *Id.*

taxes.⁸⁸ There should also be a provision allowing termination of the QDOT if it becomes unnecessary at some point in the future, for instance if the noncitizen spouse becomes a U.S. citizen.⁸⁹ Trusts that are in existence at the decedent's death may be reformed either judicially or nonjudicially to meet the QDOT requirements and thus take advantage of the marital deduction.⁹⁰ Nonjudicial reformation pursuant to a will or the trust document itself must be completed before the date of the estate tax return,⁹¹ and judicial reformation must be started by that date.⁹²

D. Nonresident Alien Client

Estate planning techniques that are useful for citizens or resident aliens are not generally applicable to nonresident alien clients.⁹³ In 1988, Congress enacted the Technical and Miscellaneous Revenue Act (TAMRA)⁹⁴ which made U.S. gift and estate tax rates that were applicable to U.S. citizens and resident aliens applicable to nonresident aliens.⁹⁵ TAMRA made several other major changes regarding the application of U.S. transfer taxes to nonresident aliens.⁹⁶

1. Current Gift Tax Provisions Applicable to Nonresident Aliens

Gift tax rules provide that only transfers of real or tangible property situated within the United States are subject to the U.S. gift tax.⁹⁷ Thus, gifts of intangible property, such as stocks and bonds, by a nonresident alien donor are not subject to U.S. gift tax, even if the property has a U.S. situs.⁹⁸ However, gift splitting is not available to a nonresident alien donor of U.S. situs property.⁹⁹ The unlimited

⁸⁸ *Id.* An institutional trustee, experienced in the complexities of a QDOT, may be needed to ensure the proper administration of such a trust.

⁸⁹ See Lowell, *infra* note 127, at 321.

⁹⁰ Treas. Reg. § 20.2056A-13.

⁹¹ Treas. Reg. § 20.2056A-4(a)(1).

⁹² Treas. Reg. § 20.2056A-4(a)(2).

⁹³ Lowell & Abel, *supra* note 41, at 16-42.

⁹⁴ Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988).

⁹⁵ I.R.C. §§ 2001(c), 2101 (a) and (b).

⁹⁶ Lowell & Abel, *supra* note 41, at 16-42.

⁹⁷ I.R.C. §§ 2501(a)(2), 2511(a). Thus, assets such as shares of stock in domestic corporations, which are considered intangible personal property, are not subject to the gift tax when transferred. § 2511(b).

⁹⁸ I.R.C. §§ 2501(a)(2); 2511(b).

⁹⁹ I.R.C. § 2513(a)(1).

marital deduction is also prohibited if the donor's spouse is not a U.S. citizen,¹⁰⁰ although there is a \$100,000 special annual exemption for gifts made to the donor's spouse and the \$10,000 annual exclusion does apply for gifts to others.¹⁰¹ The marital deduction will be allowed if a gift is made to a QDOT for the spouse.¹⁰² Another difference is that no unified credit is available for nonresident alien gifting¹⁰³ but charitable deductions are allowed if the gifts are made to U.S. organizations or are to be used in the United States.¹⁰⁴

2. Current Estate Tax Provisions Applicable to Nonresident Aliens

There are similar provisions regarding a nonresident alien's treatment for estate tax purposes. The nonresident alien's gross estate includes all property situated or deemed situated within the United States at death.¹⁰⁵ There is a unified credit available of \$13,000.¹⁰⁶ Again, no marital deduction is allowed for property passing to a noncitizen spouse unless the property passes to a QDOT for the benefit of the spouse,¹⁰⁷ although a full marital deduction is allowed to a nonresident alien whose spouse is a U.S. citizen.¹⁰⁸ The surviving spouse must show the amount of

¹⁰⁰ I.R.C. § 2523(i)(1).

¹⁰¹ I.R.C. § 2523(i)(2).

¹⁰² I.R.C. § 2056(d)(2).

¹⁰³ I.R.C. § 2505(a).

¹⁰⁴ I.R.C. § 2522(b).

¹⁰⁵ I.R.C. § 2103.

¹⁰⁶ I.R.C. § 2102(c). This credit exempts \$60,000 of the nonresident alien decedent's estate from taxation. If there is a treaty between the United States and the nonresident alien's home country, the full unified credit may be available, but it will be allowed only in proportion to the nonresident alien's property situated in the U.S. Collins, *supra* note 51, at 32. Because the unified credit is lower for a nonresident alien, the effective estate tax rate is higher than that applied to U.S. citizens or resident aliens. *Id.*

¹⁰⁷ I.R.C. §§ 2056(d)(1) and (e), 2106(a)(3). An exception exists if the noncitizen spouse becomes a U.S. citizen before the federal estate tax return is filed. *Id.* The noncitizen spouse must, however, have been a U.S. resident at all times following the decedent's death and before becoming a citizen. *Id.* Due to the length of time the citizenship process takes to complete, such a spouse cannot practically satisfy the requirements of this exception unless the citizenship process was initiated prior to the decedent's death. Fijolek & Miller, *supra* note 28, at 20. Uncertainties remain concerning allowance of the marital deduction for noncitizen spouses becoming U.S. citizens by the time late estate tax returns are filed. *Id.*

¹⁰⁸ I.R.C. § 2106(a)(3).

his or her contribution towards jointly held property because the assumption that each spouse contributed equally no longer applies.¹⁰⁹ In addition, the generation skipping transfer tax (GSTT) applies to transfers by nonresident aliens of any U.S. situs property.¹¹⁰

Assets that are already subject to U.S. transfer tax laws should be treated the same for planning purposes as assets of U.S. citizens,¹¹¹ but careful planning may be needed to structure asset arrangements so as to avoid transfer tax liability for the nonresident alien.¹¹² Keep in mind that treaties or gift and estate tax credits in the country of death can reduce the danger of double taxation for nonresident aliens.¹¹³

One of the simplest and most advantageous planning options is transferring intangible assets during life. Although the federal estate tax applies to the nonresident alien's transfer of intangible property at death, the federal gift tax does not apply to a nonresident alien's lifetime transfer of such assets situated in the United States.¹¹⁴

Another important consideration is the use of a foreign corporation to hold U.S. situs property.¹¹⁵ This would convert the property to non-U.S. situs

¹⁰⁹ I.R.C. §§ 2040(b); 2056(d)(1)B.

¹¹⁰ I.R.C. § 2663(2). See also proposed Treas. Reg. § 26.2663-2.

¹¹¹ Consider, however, the possibility of the nonresident alien establishing resident alien status if all or most of his assets are located in the U.S. Collins, *supra* note 51, at 33. As a resident alien, he could then take advantage of the full unified credit rather than the \$13,000 nonresident alien credit. *Id.*

¹¹² Lowell & Abel, *supra* note 41, at 16-43. This can be particularly useful should the nonresident alien plan on remaining in the United States.

¹¹³ *Id.*

¹¹⁴ I.R.C. § 2511; Treas. Reg. §§ 25.2511-1(b), 25.2501-1 and 25.2511-3. The alien should avoid retaining any power or interest in the gift that could trigger U.S. estate tax under I.R.C. §§ 2035-2038. Collins, *supra* note 51, at 34. Many commentators, and apparently the IRS, believe that partnership interests are intangible assets and thus not subject to the U.S. gift tax when the donor is a nonresident alien. Miller, *supra* note 31, at 378; Prv. Ltr. Rul. 7737063. U.S. partnership interests, however, are considered to be U.S. assets subject to estate tax at the nonresident alien's death. Miller, *supra* note 31, at 380. The safest conclusion is that a partnership or similar entity would not protect the nonresident alien's estate from U.S. estate taxation. Collins, *supra* note 51, at 35.

¹¹⁵ Collins, *supra* note 51, at 34.

property.¹¹⁶ Assets such as real estate or other tangible assets held by the nonresident alien can effectively escape U.S. estate taxation by transferring the ownership of such assets to the foreign corporation.¹¹⁷ Shares in the foreign corporation are considered non-U.S. situs property and are not subject to either the U.S. gift or estate taxes.¹¹⁸

In order to escape U.S. income taxation on the transfer of real property to the foreign corporation,¹¹⁹ the best approach is to have the foreign corporation acquire any U.S. real property from the outset.¹²⁰ Care must be taken to closely adhere to corporate formalities to resist IRS claims that the corporation is simply a sham.¹²¹ It is important for the planner to remember that tax treaties may also protect the noncitizen from taxation of his U.S. partnership and corporate interests.¹²²

Trusts can be useful as a means of putting a buffer between the alien's assets and the tax regime of one or more countries.¹²³ Foreign situs trusts can also

¹¹⁶ *Id.* at 34.

¹¹⁷ *Id.* The planner should also consult relevant state statutes as some may restrict or prohibit foreign ownership of real estate. *Id.* If the property is transferred to the foreign corporation, rather than acquired by the corporation from the outset, the retained control argument may be rebutted by proving that the transfer was made for full and adequate consideration in money or money's worth by virtue of the issuance of stock by the foreign corporation. *Id.*

¹¹⁸ Miller, *supra* note 31, at 380.

¹¹⁹ Collins, *supra* note 51, at 34. Under the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA), the nonresident alien would be subject to income tax on the transfer because he will be deemed to be engaged in a U.S. trade or business by virtue of holding U.S. real property, and any gain from its disposition is considered connected with the trade or business and thus subject to income taxation. *Id.*

¹²⁰ *Id.* This also undermines the IRS argument that the nonresident alien retained control of the property despite the transfer of ownership to the corporation. *Id.* The nonresident alien must also guard against the IRS challenge that the foreign corporation is merely a sham and should be disregarded for tax purposes. *Id.* This challenge occurred in *Fillman-v. United States*, 355 F.2d 632 (Ct. Cls. 1966). The court determined that the foreign corporation's activities concerning the assets were performed as custodian for the decedent and so he remained the true owner and the assets were includable in his estate. Collins, *supra* note 51, at 34.

¹²¹ Collins, *supra* note 51, at 34.

¹²² Miller, *supra* note 31, at 381.

¹²³ Lowell & Abel, *supra* note 41, at 16-43.

be used to avoid federal gift taxes, but not federal income taxes.¹²⁴ A foreign situs trust is preferable to any direct ownership of U.S. real estate by a nonresident alien.¹²⁵ Such a trust must be irrevocable and must have an independent trustee.¹²⁶ Because federal income taxation of foreign trusts is quite complex, extreme care must be exercised whenever the estate planner is dealing with foreign trusts created by either a U.S. person or created by a foreign person for the benefit of a U.S. person.¹²⁷ The use of a foreign trust may add more flexibility to an estate plan than the use of a foreign corporation and may be used in combination with such a corporation.¹²⁸

Apart from the tax considerations, foreign trusts may be considered to insulate U.S. assets from the burdens of U.S. probate, to effect testamentary dispositions that could be challenged under mandatory heirship laws in effect in other countries, to provide an emergency vehicle to protect against political unrest in the home country, or to protect assets from creditors.¹²⁹

A QDOT should be considered for any client with a noncitizen spouse and diligence is necessary when drafting the trust to ensure that it meets the QDOT requirements.¹³⁰ The planner must determine the benefits to be gained from the use of the QDOT compared with the restrictions the QDOT imposes on the assets of the decedent and whether a plan of gifting to the spouse would better meet the client's goals and objectives.

¹²⁴ Leimberg, *supra* note 20, at 215.

¹²⁵ *Id.* at 216.

¹²⁶ *Id.* at 214.

¹²⁷ Robert C. Lawrence, III, *International Structuring for Non-U.S. Clients and the U.S. Federal Tax Implications Thereof*, 241 PLI/EST. 1081, 1115 (1995). For comprehensive discussions concerning the complex foreign trust rules, *see, e.g.*, M. Annette Gold, *United States Estate and Gift Taxation of Nonresident Aliens: Troublesome Situs Issues*, 51 TAX LAW. 109 (1997); Cym H. Lowell, *Estate Planning in the International Arena*, C694 ALI-ABA 293 (1991); Norman H. Glickman, *Asset Protection Trusts and International Estate Planning*, 241 PLI/EST. 419 (1995); Nicholas S. Freud, *Foreign Trusts*, SB45 ALI-ABA 77 (1998).

¹²⁸ Leimberg, *supra* note 20, at 215. For example, the corporation could hold the real estate and the corporate stock could be held in the irrevocable trust. *Id.*

¹²⁹ Lowell & Abel, *supra* note 41, at 16-44.

¹³⁰ *See* Cynthia Blum, *U.S. Transfer Taxation of Nonresident Aliens: Too Much or Too Little?*, 14 U. PA. J. INT'L BUS. L. 469 (1994) for a discussion of the burdens of the QDOT requirement and possible solutions for the problems associated with nonresident alien transfer taxation.

In late 1995 the IRS issued final Regulations regarding the application of the generation-skipping transfer tax (GSTT) to transfers made by nonresident aliens.¹³¹ These final Regulations are much more favorable in their treatment of nonresident alien transfers than the Proposed Regulations the IRS had issued previously.¹³² While the Proposed Regulations applied the GSTT to transfers by nonresident aliens of both U.S. and non-U.S. situs property,¹³³ the Final Regulations apply the tax only to transfers by nonresident aliens that are subject to federal gift or estate tax.¹³⁴ This essentially means that transfers of U.S. situs property upon the death of the nonresident alien would be subject to the GSTT, as would lifetime transfers of real or tangible property situated in the U.S.¹³⁵

The final Regulations utilize the "situs rule" which subjects nonresident alien transfers to GSTT if the property was situated in the United States for a gift or estate tax purpose.¹³⁶ Consequently, a direct skip by a nonresident alien is subject to the GSTT only to the extent that the transfer is subject to either gift or estate tax.¹³⁷ For property in trust, the GSTT applies to either a taxable distribution or a taxable termination to the extent that the nonresident alien's initial transfer of property to the trust was subject to gift or estate tax.¹³⁸ These rules make citizenship and residency issues concerning the nonresident alien's descendants irrelevant, and as a result, only if the *initial* transfer is subject to U.S. gift or estate tax will the GSTT apply.¹³⁹ This could be quite a benefit in estate planning because,

¹³¹ T.D. 8644, 1996-7 I.R.B.16.

¹³² C. Jones Perry, *IRS Eases Rules Applicable to Nonresident Aliens in Final GST Tax Regs*, 23 EST. PLAN. 153 (1996).

¹³³ Two separate rules allowed imposition of the GSTT on transfers by nonresident aliens in the proposed regulations. Under the "deemed transferor rule," the GSTT would have been imposed, regardless of the situs of the property, if a beneficial interest passed to a U.S. citizen or resident alien skip person and the transferor's lineal descendant, who is the skip person's lineal ancestor, was a U.S. citizen or resident alien. Perry, *supra* note 132, at 154-55. Under the "situs rule," the transfer was subject to tax if the property was situated in the U.S. for either gift or estate tax purposes. *Id.* at 154.

¹³⁴ Treas. Reg. § 26.2663-2(b) and 26.2663-2(c) (1996); Perry, *supra* note 132, at 153.

¹³⁵ See *supra* notes 97-110 and accompanying text for a discussion of the estate and gift tax rules applicable to nonresident aliens.

¹³⁶ Perry, *supra* note 132, at 154.

¹³⁷ Treas. Reg. § 26.2663-2(b)(1).

¹³⁸ Treas. Reg. § 26.2663-2(b)(2).

¹³⁹ Perry, *supra* note 132, at 155. Under the "deemed transferor rule" included in the Proposed Regulations, the citizenship and residency of the beneficiaries of the trust would be essential to determining whether the GSTT would apply. *Id.* at 154.

for example, the nonresident alien could make a lifetime gift of U.S. corporate stock placed in a trust that provides income to his child for life and remainder to his grandchild. Even if both the child and grandchild were U.S. citizens, the taxable termination occurring at the child's death is not taxable because the initial transfer, that of an intangible asset, was not subject to federal gift tax.¹⁴⁰ The same result would occur even if the stock was sold by the trustee and reinvested in U.S. real estate or tangible property.¹⁴¹

Nonresident aliens are also permitted to allocate their \$1 million GSTT exemption in the same manner as U.S. citizens and resident aliens.¹⁴² The Regulations provide special rules if a trust is funded with property subject to the GSTT and property that is exempt from the tax.¹⁴³ Because the GSTT is applied to property that is subject to the gift or estate tax, the same treaty rules that limit the application of those taxes should limit the application of the GSTT.¹⁴⁴

Effective GSTT planning for nonresident aliens is basically designed to avoid transfers subject to either the gift or estate tax and the planning options already considered generally apply.¹⁴⁵ Special planning for GSTT purposes is needed when dealing with a QDOT, however.¹⁴⁶ It may be beneficial to transfer property outright to the spouse if the trust property exceeds \$1 million and is intended to pass to skip persons following the surviving spouse's death.¹⁴⁷ He or she could then transfer the property to a QDOT and obtain the marital deduction

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Treas. Reg. § 26.2632-1.

¹⁴³ Treas. Reg. § 26.2663-2(c). A fraction is determined that will be applied to the trust, the numerator of which is the sum of the GST exemption allocated to the trust plus the nontaxable portion of the trust, and the denominator of which is the value of all property transferred to the trust minus federal and state death taxes based on the transferred property, any charitable deductions and any nontaxable gifts occurring in direct skips. Perry, *supra* note 132, at 156. The nontax portion of the trust is a fraction, the numerator of which is the value of property that is not subject to GSTT and the denominator of which is the value of the entire trust. *Id.* If the property is later included in the transferor's gross estate, the applicable fraction is determined at the date of death rather than at the date of the transfer. *Id.* This is the same rule applied to transfers by U.S. citizens and resident aliens. *Id.*

¹⁴⁴ Perry, *supra* note 132, at 156.

¹⁴⁵ *Id.* at 156-57.

¹⁴⁶ *Id.* at 157.

¹⁴⁷ *Id.*

and he or she will be treated as the transferor for GSTT purposes.¹⁴⁸ If the spouse is a nonresident alien at death and the trust assets are not subject to estate tax at his or her death, they will not be subject to the GSTT either.¹⁴⁹

Special care is also needed when planning for nonresident aliens who are considered U.S. residents for income tax purposes. Assets that are non-U.S. situs property may inadvertently be converted to U.S. situs property by virtue of the nonresident alien's income tax status, and thus subject to both estate and GST tax.¹⁵⁰

E. Citizen Client Not Residing in the United States

Where the client is a U.S. citizen but is not residing in the United States, the rules are rather straightforward. Gift and estate taxes are imposed on all U.S. citizens no matter where they live.¹⁵¹ The same rules should apply to GSTT as well.¹⁵² These taxes will be levied on the entire worldwide estate of the decedent citizen client. Thus, the normal estate planning techniques can be utilized to create an estate plan for such a person, assuming that the client could not be considered an expatriated citizen.

F. Expatriated American Clients

Believing they can avoid federal taxation, U.S. citizens sometimes expatriate from the United States and thus become nonresident aliens.¹⁵³ If an individual commits an act of expatriation voluntarily, with the intent to surrender citizenship, he will lose his U.S. citizenship.¹⁵⁴ Such expatriates are subject to U.S.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* U.S. situs property should not be transferred into the QDOT by the surviving spouse to avoid that property being included in his or her gross estate. *Id.* The surviving spouse may, however, transfer the proceeds of sale of U.S. situs property to the QDOT. See Treas. Reg. § 20.2056A-4(b)(3).

¹⁵⁰ Perry, *supra* note 132, at 157. For example, if the nonresident alien is a resident for income tax purposes, interest from certain debt instruments would not qualify for the portfolio interest exception and so the property would be treated as U.S. situs property. *Id.* United States bank deposits would also appear to be deemed U.S. situs property if the nonresident alien is subject to U.S. income tax. *Id.*

¹⁵¹ Leimberg, *supra* note 20, at 213. See I.R.C. §§ 2001(a), 2501(a).

¹⁵² Leimberg, *supra* note 20, at 213.

¹⁵³ Rozansky, *supra* note 21, at 1305.

¹⁵⁴ 8 U.S.C. § 1481(a). Specific acts of expatriation include taking an oath of allegiance to

income, gift and estate tax on a broader range of items than are other nonresident aliens.¹⁵⁵ If at least one of the principal purposes of the expatriation was to avoid U.S. taxes,¹⁵⁶ and U.S. citizenship is lost within 10 years of the expatriate's death, the expatriate's estate would be taxed on both property situated within the United States and on the value of stock in certain foreign corporations.¹⁵⁷ Within the ten-year period, gifts of U.S. situs intangible property remains subject to the U.S. gift tax while the same gifts made by other nonresident aliens are not subject to the tax.¹⁵⁸ The same tax rates would apply as those for U.S. citizens.¹⁵⁹

In response to perceived abuses by offshore corporations in the reporting of income, and the ability of individuals to benefit from many years of living in the U.S. while escaping the payment of U.S. taxes, Congress enacted the Health Insurance Portability and Accountability Act of 1996 (HIA).¹⁶⁰ Under the recent legislation, changes have been made to the expatriation rule and the rule has been extended to include long-term U.S. residents who give up their green cards and

a foreign nation, obtaining naturalization in a foreign state, making a formal renunciation of nationality, serving in the armed forces of a foreign nation engaged in hostilities with the United States, serving in any governmental post of a foreign nation or engaging in an act of treason against the United States. *Id.*

¹⁵⁵ Leslie A. Share, *Planning Impact of New Expatriation and Foreign Trust Tax Rules*, 24 EST. PLAN. 51, 51 (1997).

¹⁵⁶ There are several ways that avoidance of taxes can be deemed to be the "principal purpose" of expatriation. For example, under I.R.C. § 877, the expatriate is generally deemed to satisfy the principal purpose test if either (1) his average annual net U.S. income tax for the 5 years preceding expatriation is at least \$100,000, or (2) his net worth as of the date of expatriation is at least \$500,000. These figures are subject to cost of living adjustments. I.R.C. § 877(a)(2).

¹⁵⁷ I.R.C. §§ 2107, 877. The expatriate's gross estate will include U.S. property held by foreign corporations if the expatriate owned 10% or more of the total combined voting power of stock, and if he owned 50% of the total value of the foreign corporation or owns, or is attributed with ownership of, 50% or more of the voting power of stock. I.R.C. § 2107.

¹⁵⁸ I.R.C. § 2501(a)(3). A special definition exists for the situs of intangible property of an expatriate whose intangible property is not considered to be exempt from the U.S. gift tax. I.R.C. § 2511(b). Thus, stock in a foreign corporation may be deemed to be situated in the United States if the decedent owned a sufficient interest, either directly or indirectly, and the corporation owned U.S. assets. *Id.*

¹⁵⁹ Sherman, *supra* note 8, at 132.

¹⁶⁰ Pub. L. No. 104-191, 110 Stat. 1936 (1996); Barbara R. Hauser, *International Estate Planning*, 11 APR PROB. & PROP. 48, 49 (1997).

cease to be permanent residents.¹⁶¹ These resident aliens believe that they can escape U.S. taxation of their worldwide estates by leaving the United States and disposing of their green cards.¹⁶² The HIA, however, removes a resident alien's power to easily manipulate his tax status and subjects him to essentially the same rules as a citizen expatriate.¹⁶³

Realizing that there may be nontax reasons for renouncing U.S. citizenship, Congress included various safe harbors in the HIA that allow an individual to escape being treated as having a tax avoidance purpose for expatriating.¹⁶⁴ One such safe harbor provides that the expatriate can avoid the expatriation tax provisions if he submits a ruling request to the IRS, within one year of the loss of citizenship, for a determination that he was outside the principal purpose test.¹⁶⁵ Although the submission of a ruling request does not guarantee a favorable ruling by the IRS,¹⁶⁶ the failure to submit the request conclusively establishes a tax avoidance purpose for expatriating.¹⁶⁷

¹⁶¹ I.R.C. § 877(e). Expatriates now include long-term residents who are non-U.S. citizens who held a green card for at least eight of the last fifteen years prior to expatriation, and who either terminate their resident alien status by giving up their green card, or who become residents of a foreign country under a tax treaty and do not waive treaty benefits. I.R.C. § 877(e)(1) and (e)(2). See also Hauser, *supra* note 160, at 49.

¹⁶² Share, *supra* note 155, at 52.

¹⁶³ *Id.*

¹⁶⁴ *Id.* See also Hauser, *supra* note 160, at 49. There are many exceptions to the rule and the Code allows the Treasury to expand the categories of persons for whom tax avoidance will not be presumed. Gold, *supra* note 127, at 143.

¹⁶⁵ I.R.C. § 877(c)(1). Tax avoidance will not be presumed, even if the expatriate meets the net worth or income tax thresholds, but the former citizen must either (1) have been a dual citizen of the U.S. and a foreign country since his birth, and must retain only his non-U.S. citizenship; (2) have become a citizen of the country of his birth, the country of birth of his spouse, or the country of birth of his mother or father, within a reasonable period after expatriating; (3) have been present in the U.S. for 30 days or less during each year in the 10 year period prior to expatriation; (4) have expatriated before attaining the age of 18-1/2; or (5) be described in a category of individuals to be included in forthcoming Regulations. I.R.C. § 877(c)(2).

¹⁶⁶ Share, *supra* note 155, at 52. The IRS will consider such factors as the person's pre-expatriation ties to the U.S., the retention of U.S. citizenship by the person's spouse, and the extent to which the expatriate lives in a country that imposes little or no tax. *Id.*

¹⁶⁷ *Id.*

This safe harbor does not currently exist for resident aliens, however, and they are still subject to the principal purpose test of pre-HIA law.¹⁶⁸ The estate planner should be aware of both the old principal purpose test and the current safe harbors until Regulations are promulgated that address the inequities that currently exist.¹⁶⁹ The HIA does provide for credits to be given for any foreign income, gift, estate or other taxes imposed on assets subject to tax under the expatriation rules.¹⁷⁰ Foreign gifts, which are amounts received from a person other than a U.S. person which the donee treats as a gift or bequest, totaling more than \$10,000 to a U.S. donee must also be reported under the HIA.¹⁷¹ The Treasury appears to be authorized to reclassify the alleged gift as income or otherwise and may impose penalties up to 25% for failure to report the foreign gift.¹⁷² Such reclassification could result in adverse tax consequences to the donee of the gift.¹⁷³

Lastly, under the Immigration Reform and Immigrant Responsibility Act of 1996, any alien who is a former U.S. citizen and who has officially renounced his U.S. citizenship for tax avoidance purposes, may be permanently excluded from the United States.¹⁷⁴ It is unclear at this point whether this rule will also be applied to former resident aliens who leave the United States to avoid the U.S. taxing authority. Thus, the estate planner must counsel his clients that the potential savings gained from expatriation may not be had without great personal cost.

III. CONCLUSION

Today's society is one that is mobile and ever changing. Individuals may accumulate property in multiple nations during the course of their lifetimes and may need special planning to dispose of that property at their death. Many individuals who own U.S. property are not citizens of the United States and may have acquired the property, both real and personal, for either business or personal reasons.

The growth of foreign acquisition of assets in the United States and the increase of both resident and nonresident aliens in this country has led to an

¹⁶⁸ *Id.* at 52-53. See also *supra* note 156 for the elements of the principal purpose test.

¹⁶⁹ Share, *supra* note 155, at 53.

¹⁷⁰ *Id.* at 54.

¹⁷¹ I.R.C. § 6039F; Hauser, *supra* note 160, at 49.

¹⁷² Share, *supra* note 155, at 55; Hauser, *supra* note 160, at 49.

¹⁷³ While these consequences may not fall upon the nonresident alien client, his estate planner should apprise him of these issues.

¹⁷⁴ Pub. L. 104-208, 110 Stat. 3009 (1996); Hauser, *supra* note 160, at 49.

increasing demand for U.S. estate planners who have expertise in answering the legal questions involved when estates cross national boundaries. The estate planning options that exist for non-U.S. citizens may vary depending on the status of the particular individual in question. The existence of a transfer tax treaty may also affect the noncitizen client's estate plan. Each noncitizen's individual situation must be carefully analyzed in order to provide the client with the best possible planning solutions to deal with the possible U.S. taxation of his property when he either devises or gifts such property. As the numbers of non-U.S. citizens continue to increase in Ohio, the astute Ohio estate planner will need to understand the many IRC provisions and their nuances that may be applicable to these noncitizens so that he may serve his clients both confidently and effectively.

Appendix A

**UNITED STATES ESTATE, GIFT, AND
GENERATION-SKIPPING TRANSFER TAX TREATIES**

<i>Contracting State</i>	<i>Date Effective</i>	<i>International Citation</i>	<i>Treasury Citation</i>
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ESTATE TAX TREATIES

Australia	7 Jan. 1954	TIAS No. 2903	1957-1 C.B. 633
Austria	1 July 1983	TIAS No. 10570	
Canada	14 June 1941	TIAS No. 989	1945 C.B. 381
Amendment	21 Nov. 1951	TIAS No. 2348	1954-2 C.B. 633 1957-2 C.B. 992
Canada (2 nd Treaty)	1 Jan. 1959	TIAS No. 4995	
Protocol	9 Nov. 1995	TIAS No. 11087	
Denmark	7 Nov. 1984	TIAS No. 11089	
Finland	18 Dec. 1952	TIAS No. 2595	1957-1 C.B. 641
France	1 Oct. 1980	TIAS No. 9812	
Germany	27 June 1986	TIAS No. 11082	
Greece	30 Dec. 1953	TIAS No. 2901	1957-1 C.B. 645
Protocol	30 Dec. 1953	TIAS No. 2901	1957-1 C.B. 645
Protocol	27 Oct. 1967		1968-1 C.B. 631
Ireland	20 Dec. 1951	TIAS No. 2355	1957-1 C.B. 650
Italy	26 Oct. 1956	TIAS No. 3678	1956-2 C.B. 1089
Japan	1 Apr. 1955	TIAS No. 3175	1955-1 C.B. 654
Netherlands	3 Feb. 1971	TIAS No. 7061	
Norway	11 Dec. 1951	TIAS No. 2358	1957-1 C.B. 653
Sweden	13 June 1983	TIAS No. 10826	
Switzerland	17 Sept. 1952	TIAS No. 2533	1957-1 C.B. 657
Union of S. Africa	15 July 1952	TIAS No. 2509	1957-1 C.B. 659
Protocol	1 July 1944	TIAS No. 2509	
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369

GIFT TAX TREATIES

Australia	14 Dec. 1953	TIAS No. 2879	1957-1 C.B. 637
Austria	1 July 1983	TIAS No. 10570	
Denmark	7 Nov. 1984	TIAS No. 11089	
France	1 Oct. 1980	TIAS No. 9812	
Germany	27 June 1986	TIAS No. 11082	
Japan	1 April 1955	TIAS No. 3175	1955-1 C.B. 654
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369

GENERATION-SKIPPING TRANSFER TAX TREATIES

Austria	1 July 1983	TIAS No. 10570	
<i>Contracting State</i>	<i>Date Effective</i>	<i>International Citation</i>	<i>Treasury Citation</i>
Denmark	7 Nov. 1984	TIAS No. 11089	
France	1 Oct. 1980	TIAS No. 9812	
Germany	27 June 1986	TIAS No. 11082	
Netherlands	3 Feb. 1971	TIAS No. 7061	
United Kingdom	11 Nov. 1979	TIAS No. 9580	1980-1 C.B. 369